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BEFORE THE
ENVIRONMENTAL MATTERS COMMITTEE OF THE
MARYLAND HOUSE OF DELEGATES

TUESDAY
SEPTEMBER 7, 1993

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I. INTRODUCTION

Thank you for your kind invitation to discuss today tort law, workers' compensation, and The American With Disabilities Act of 1990 liability implications that may arise from public place exposure of Environmental Tobacco Smoke (ETS). Although I was invited to testify by The Tobacco Institute, let me make clear that the views that I am expressing today are my own and not those of any interest group. My testimony will be limited to liability issues, a topic that I have studied and practiced for the past three decades. I am not here to comment on broad social policy questions about whether this state should ban smoking in public places. In a nutshell, I will provide a limited perspective on a specific area and, hopefully, it will be of use to this Committee.

II. GENERAL

A. Tobacco Liability Background

Witnesses that you will hear from today who suggest that ETS in public places will create an avalanche of liability have predicted the same result with respect to primary smoking cases -- cases brought by smokers or their relatives against tobacco companies. Nevertheless, since the first cases were brought in the primary smoking area four decades ago, no individual has been able to recover damages. These individuals were represented by very bright and diligent attorneys. Extraordinary discovery and information gathering were a bedrock on which these cases had to rise or fall. In spite of the fact that there has been widespread

publicity from the Surgeon General and others asserting that primary smoking is dangerous to one's health, the cases failed.

Apart from the primary smoking cases, no ETS cases have proceeded beyond preliminary phases.

It is true, as will be pointed out, that the primary smoking cases are different from ETS cases. In the primary smoking cases it can be argued that a claimant knew of the risk and voluntarily encountered it. Lawyers call this "assumption of risk." In many states, this is a good defense. In ETS cases, by way of contrast, a claimant can argue that he did not know of the claimed risk of ETS exposure or, because economic necessity compelled him to work for a living, he did not voluntarily encounter it. In some situations one could argue that a person knew of the purported risk and voluntarily encountered it, he or she could have chosen another occupation, but the basic point is that the assumption of risk defense may not prevail in all cases. Nevertheless, claimants, whether under workers' compensation or common law, face a hurdle that has not been a major one in all recent primary smoker cases, that of causation. When it comes to causation, a person who has smoked three packs of cigarettes for thirty years is in a better situation to prove causation than an individual who has been exposed to some smoke in a work place. As I will detail today, in spite of the recent EPA report classifying tobacco smoke as a "Class A" carcinogen, the causation hurdle is unlikely to be vaulted by many claimants either under the common law of torts or workers' compensation.

III. COMMON LAW ACTION IN TORT

As I have indicated, there have been no successful actions by claimants in ETS cases. It is true such cases are new, but knowledge about potential problems with ETS has been in the literature for many years. Under the common law, the plaintiff must prove that an injury was the predicate for his harm on a "more probable than not" basis. See Maryland Civil Pattern Jury Instruction 10:1 (2d ed. 1984). It is almost impossible in common law actions, even with "lax rules" permitting marginally qualified experts to testify, to show that ETS, was the primary or principal cause of a harm. Assuming that EPA's classification of ETS as a "Group A" carcinogen is correct, all of us are exposed to many carcinogens everyday -- anyone driving a car through tunnels and through traffic breathes in Benzene (a "Class A" carcinogen under EPA rules) as well as other substances that have been identified by the EPA as causes of cancer.

For example, Chromium is found in almost all tap water. Millions of pounds are released into the air from industrial sources each year. EPA has classified Chromium as a "Class A" carcinogen.

Benso(A) Pyrene is classified by EPA as a "Class B" carcinogen. It is found in the air and also on things like roast coffee, hamburgers, and fuel from wood fires and barbecues. Formaldehyde, another "Class B" substance, can be released from office furnishings.

Also, if we are focusing on cancer, its potential causes are many, including family history, eating patterns, and other sources.

The bottom line is that while plaintiffs who have been exposed to ETS may be more sympathetic to juries than primary smokers, it is very unlikely that they will have success under the common law of torts. Let me now focus on workers' compensation claims.

IV. WORKERS' COMPENSATION CLAIMS

It is unlikely that an employer would be held liable for workers' compensation under Maryland law for employee injuries allegedly due to ETS. Injury allegedly due to exposure to ETS is not an "accidental personal injury," because workplace smoking is not an unusual event in the daily routine of the workplace and employees are equally exposed to ETS outside of the workplace. Disease allegedly caused by workplace ETS would also fail to constitute an "occupational disease" within the meaning of the Maryland statute because ETS is not a naturally inherent condition of any employment.

A. Accidental Personal Injury

An injury allegedly caused by workplace exposure to ETS would not "arise out of the scope of employment" as defined by the Maryland courts. An injury arises out of employment when, "after consideration of the facts and circumstances of the case, it is apparent to the rational mind that there was a causal connection between the conditions under which the work is required to be performed and the ensuing injury." Blake Construction Co. v. Wells, 225 A.2d 857, 862 (Md. 1967). The causative danger must be "incidental to the nature of the business, and not independent of

the relation of master and servant." Id. An injury caused by a "hazard to which the workman would have been equally exposed apart from his employment" is not compensable under the Maryland statute. Id.; Consolidated Engineering Co. v. Feikin, 52 A.2d 913, 916 (Md. 1947).

ETS is a condition to which an employee is equally exposed apart from his employment. Therefore, this alleged causative danger is not incidental to the nature of the work. Any resulting injury would therefore not "arise out of" an employee's employment.

An injury allegedly caused by workplace exposure to ETS is unlikely to be deemed "accidental" within the meaning of the workers' compensation statute. Unlike many other jurisdictions, Maryland has adopted a very narrow interpretation of "accident."[1/] Sargent v. Board of Education,, 433 A.2d 1209, 1211 (Md. Ct. Spec. App. 1981). In order for an injury to be "accidental," and therefore compensable, it must result from "some unusual or extraordinary condition of the employment." Stancliff v. H.B. Davis Co., 117 A.2d 577, 583 (Md. 1955) (emphasis added); Sargent, 433 A.2d at 1211. Injuries that occur without special incident, simply as a result of day-to-day working conditions, are not compensable under the workers' compensation scheme as "accidents." See Whiting-Turner Contracting Co. v. Turner, 274 A.2d 390, 394

1/ The majority of jurisdictions consider an injury to be accidental if it was the unexpected result of the routine performance of the employee's duties. Sargent, 433 A.2d at 1211. However, "Maryland law requires an accident and not merely a result." Whiting-Turner Contracting Co. v. McLaughlin, 274 A.2d 390, 394 (Md. Ct. Spec. App. 1971).

(Md. Ct. Spec. App. 1971). Thus, where smoking is permitted in designated areas as part of the normal, daily working conditions, any injury allegedly caused by that smoking is not "accidental." Unless an employee's injuries arose on the unusual occasion of another specific worker smoking in the workplace, any injuries allegedly due to workplace exposure to ETS are unlikely to be compensable accidents.

B. Occupational Disease

Employee injuries and diseases allegedly due to workplace exposure to ETS would not be compensable under Maryland law as an "occupational disease." A compensable occupational disease is limited to "the expectable result of working under conditions naturally inherent in the employment and inseparable therefrom, and is ordinarily slow and insidious in its approach." Foble v. Knefely, 6 A.2d 48, 53 (Md. 1939); LeCompete v. United Parcel Service, Inc., 602 A.2d 261, 262 (Md. Ct. Spec. App. 1992). The state courts have emphasized that the cause of the disease must have its origin in the inherent nature or mode of work. Victory Sparkler & Specialty Co. v. Francks, 128 A. 635 (Md. 1925); LeCompte, 602 A.2d at 263. If a disease "is the consequence of some extrinsic condition or independent agency, the disease or injury" is not an occupational disease. LeCompte, 602 A.2d at 263 (citing Victory Sparkler).

ETS is not naturally inherent in any one particular employment. Instead, it is an extrinsic condition found outside of the workplace that is not inseparable from the work conditions.

Therefore, any injuries [supposedly] caused by ETS are not compensable occupational diseases.

C. Duty to Provide a Safe Workplace

The Maryland workers' compensation law is the exclusive remedy for employee injuries that arise out of and in the course of employment. Md. Lab. & Emp. Code Ann. § 9-509. If an employee's injury is not classified as an "accidental personal injury" or an "occupational disease" within the scope of the workers' compensation statute, however, common law remedies are available. Wood v. Aetna Casualty & Surety Co., 273 A.2d 125, 131 (Md. 1971).

I have addressed the causation problem with regard to common law ETS claims earlier. This problem would face both customers of commercial establishment and employees. Employees are owed a duty of care which Maryland has codified. An employer must provide a safe workplace. See Md. Lab. & Emp. Code Ann. § 5-104. This general statutory duty requires an employer to provide a safe and healthful work environment and to keep the workplace free from recognized hazards that cause or are likely to cause death or serious physical harm to the employee. Id. § 5-104(a)(1)&(2). The courts have interpreted this statute to require an employer to take "reasonable precautionary steps to protect its employees from reasonably foreseeable recognized danger." Mardo Homes, Inc. v. Commissioner of Labor and Industry, 370 A.2d 144 (Md. Ct. Spec. App. 1977).

This statutory duty would not require an employer to impose a smoking ban in the workplace. The statute merely requires employers to take "reasonable precautionary steps," which the

overwhelming majority of the employers have already done. Thus, steps such as separating smokers and non-smokers into designated smoking areas, proper ventilation, and handling specific complaints of hypersensitive workers should satisfy the statutory duty.

V. THE AMERICANS WITH DISABILITIES ACT OF 1990

A few individuals claiming special sensitivity to tobacco smoke have claimed that The Americans With Disabilities Act of 1990 (the ADA), 42 U.S.C. 12101 et seq. (Supp. 1992), requires the imposition of smoking bans or severe restrictions in various public and private facilities. This assertion is incorrect. First, nothing on the ADA's face mandates the imposition of any smoking policy whatsoever on covered entities. Second, even if an individual could establish that he was "hypersensitive" to tobacco smoke and thus "disabled" within the meaning of the ADA (which would be extremely difficult), a covered facility need only make a "reasonable accommodation" of that individual's needs. Such reasonable accommodation does not require the imposition of total bans on smoking or other severe restrictions by employers or by government.

VI. CONCLUSION

No expert or layperson can predict with absolute certainty whether any claimant in ETS cases under the common law of torts, workers' compensation or The American With Disabilities Act of 1990 will ever be able to prevail in a case. Our liability

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system, as I have suggested in other contexts, is filled with uncertainties. But this much is relatively certain, there will not be an avalanche of successful ETS liability claims. The liability hurdles that I have outlined today are not going to fall. Cases prevail where issues of fault, causation and duty are relatively clear. In spite of the EPA Report and other information sources, the ETS liability situation remains muddled at best. If policymakers are to ban smoking in public places or not, their focus should be on factors other than the liability system -- it is an irrelevant factor, one way or the other, in making this important decision.

Again, I appreciate the opportunity to talk with you today.